A FOLLOW UP TO *DISTRICT OF COLUMBIA V. HELLER*: HANDGUNS, THE SECOND AMENDMENT, AND A MOCK ORAL ARGUMENT TO BOOT

A. **Introduction**:

The Honorable Lisa A. Mayne

B. **The State of the Law Pre-*Heller*: Is the Second Amendment a Collective or Individual Right?**

Blake Bitter, George Mason Law School

C. **The Watershed and its Aftermath**:

Bran Mahoney, George Mason Law School

D. **Mock Oral Argument**:

For the Defendant: Bonnie N. Hoffman, Esq.

For the Government: Dennis J. Fitzpatrick, Esq.

Presiding Judge: The Honorable Leslie M. Alden

E. **Questions and Answers**. (Time permitting)

District of Columbia v. Heller, 554 U.S. 570 (2008), was a landmark case in which the Supreme Court of the United States held that the Second Amendment to the United States Constitution protects an individual's right to possess a firearm for private use within the home in federal enclaves. The Supreme Court followed up the *Heller* decision with *McDonald v. Chicago*, 561 U.S. ___, 130 S. Ct. 3020 (2010), which extended the *Heller* holding to the states. *Heller* was the first Supreme Court case in United States history to decide whether the Second Amendment protects an individual right to keep and bear arms for self defense. In so deciding, the Supreme Court arguably broke with its own Second Amendment precedent and overturned the holdings of almost all appellate courts that had examined the issue.

The majority held that the Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that firearm for traditionally lawful purposes, such as self-defense within the home. The dissenters reasoned that the Second Amendment protects only militia-related, rather than self-defense-related, interests. Justice Breyer further dissented on the basis that, even if the Second Amendment protected self-defense-related interests, the protection afforded by the Second Amendment is not absolute. Thus, it must be shown that D.C.'s regulation is unreasonable or inappropriate in Second Amendment terms. Because D.C.'s legislation focused on the presence of handguns in high-crime urban areas, it is a permissible and Constitutional legislative response to a serious problem.

The presentation today will focus on an examination and overview of the law pre- and post-*Heller*. The overview will be followed by a mock oral argument based on a hypothetical relating to a person's right to openly carry a firearm. The defendant will argue for an extension of the *Heller* holding based on the Supreme Court's analysis, and the prosecution will argue for a more restrictive reading of *Heller*.

The State of the Law Pre-*Heller*: Is the Second Amendment an Individual or Collective Right?

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

U.S. CONST. amend. II.

Supreme Court Cases: Pre-*Heller* Supreme Court precedent regarding whether the Second Amendment conferred an individual right or a collective right to bear arms was limited to two cases. The first case, *United States v. Miller*, 307 U.S. 174 (1939), established an uncertain rule regarding an individual's right to possess a firearm. The second case, *Lewis v. United States*, 445 U.S. 55 (1980), merely noted the Second Amendment in a footnote and reaffirmed the *Miller* rule.

> *United States v. Miller*, 307 U.S. 174 (1939) - The defendants in this case were apprehended transporting a sawed-off shotgun in interstate Commerce. After a demurrer against the indictment was sustained, the case was brought on direct appeal to the Supreme Court. The defendants did not file a brief or argue before the Supreme Court. The Court stated:
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> > In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. *Id.* at 178.
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> *Lewis v. United States*, 445 U.S. 55 (1980) - This was a felon-in-possession of a firearm case where the only discussion of the Second Amendment was in a footnote. Footnote 8 stated:
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> > These legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties. *See United States v. Miller*, 307 U.S. 174 (1939) (the Second Amendment guarantees

no right to keep and bear a firearm that does not have "some reasonable relationship to the preservation or efficiency of a well regulated militia").

Before *Heller*, Circuit Courts of Appeals adopted three distinct models interpreting *Miller* and the Second Amendment. These different models are the collective rights, sophisticated collective rights, and individual rights.

Collective Rights Model: Courts that subscribe to the Collective Rights Model hold that the Second Amendment does not apply to individuals; rather, it merely recognizes the right of a state to arm its militia. It is also known as the "states' rights" interpretation of the Second Amendment.

The Second, Fourth, Sixth, Seventh, and Ninth Circuit Courts of Appeals all adopted the collective rights model:

United States v. Johnson, 497 F.2d 548 (4th Cir. 1974) - A criminal defendant who previously had been convicted of forgery appealed from a conviction for being a felon transporting a firearm. The court found that "[t]he courts have consistently held that the Second Amendment only confers a collective right of keeping and bearing arms which must bear a 'reasonable relationship to the preservation or efficiency of a well regulated militia.'" *Id.* at 550.

United States v. Warin, 530 F.2d 103, (6th Cir. 1976) - The criminal defendant in this case appealed from his conviction for possession of an unregistered submachine gun. The court observed that *Miller* did not lay down a general rule. The court then held that "[s]ince the Second Amendment right 'to keep and bear Arms' applies only to the right of the State to maintain a militia and not to the individual's right to bear arms, there can be no serious claim to any express constitutional right of an individual to possess a firearm." *Id.* at 106.

Hickman v. Block, 81 F.3d 98 (9th Cir. 1996) - This case arose on an appeal from a denial of a concealed weapons license. The Plaintiff was an alarm company owner who wanted to become a bodyguard. The court held that the Second Amendment was a collective right held by the states and not individuals. Therefore, the plaintiff lacked standing because he could show no legal injury.

Silveira v. Lockyer, 312 F.3d 1052 (9th Cir. 2002) - This case began when residents of California brought an action challenging constitutionality of amendments to the California Assault Weapons Control Act (AWCA). In response to the Fifth Circuit's decision in *United States v. Emerson*, the court engaged in a lengthy

discussion of the Second Amendment that closely mirrors Justice Stevens' dissent in *Heller*. In a denial of an *en banc* rehearing Judges Pregerson, Kozinski, Klienfeld, and Gould filed dissents in favor of re-examining the 9th Circuit's Second Amendment interpretation. *See Silveira v. Lockyer*, 328 F.3d 567 (9th Cir. 2003).

Nordyke v. King, 319 F.3d 1185, 1191 (9th Cir. 2003) - This case was brought by a gun show organizer against a county ordinance prohibiting the possession of firearms on county property. The court characterized the Second Amendment as a collective right and therefore found that the plaintiff lacked standing to challenge the county ordinance. The court did recognize an academic trend toward an individual rights model and expressed that the court might have entertained an individual rights argument absent contrary precedent.

Gillespie v. City of Indianapolis, 185 F.3d 693 (7th Cir. 1999) - This case involved a police officer convicted of domestic violence who sued for injunctive relief to allow him to maintain his employment which requires lawful possession of a firearm. The Seventh Circuit noted the ambiguity of *Miller* and went on to hold that the text of the Second Amendment suggested a collective right. The court went on to hold that "the right protected by the Second Amendment is indeed a collective rather than an individual one. . . " *Id.* at 710.

Bach v. Pataki, 289 F. Supp. 2d 217 (N.D.N.Y. 2003) *aff'd*, 408 F.3d 75 (2d Cir. 2005) - This case involved a suit brought by a former navy seal challenging a New York law limiting concealed weapons permits to New York citizens. Second Circuit precedent on the Second Amendment was limited to *United States v. Toner*, which stated that "the right to possess a gun is clearly not a fundamental right." 728 F.2d 115, 128 (2d Cir.1984). The court discussed precedent from other circuits and combined that reasoning with *Toner* to conclude that the Second Amendment was a collective right. The court upheld the statute.

For additional cases applying this model *see United States v. Jackubowski*, 63 F. App'x. 959 (7th Cir. 2003) (conditional guilty plea to felon in possession); *United States v. Napier*, 233 F.3d 394 (6th Cir. 2000) (conditional guilty plea to possession of a firearm while subject to domestic violence order); *United States v. Warin*, 163 F. App'x. 390 (6th Cir. 2006) (unpublished) (felon in possession); *Olympic Arms, et al. v. Buckles*, 301 F.3d 384 (6th Cir. 2002) (declaratory judgment action by firearm manufacturers and dealers challenging restrictions on

semiautomatic weapons); *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121 (9th Cir. 1996) (finding plaintiffs' lacked standing to challenge law prohibiting manufacture or possession of semiautomatic weapons); *Sandidge v. United States*, 520 A.2d 1057 (D.C. 1987) (unlicensed possession of a pistol not protected by the Second Amendment).

Sophisticated Collective Rights Model: Courts that adopt the Sophisticated Collective Right model hold that the Second Amendment recognizes some limited form of individual right; however, this supposedly "individual" right to bear arms can only be exercised by members of a functioning, organized state militia who bear the arms while and as a part of actively participating in the organized militia's activities. The "individual" right to keep arms only applies to members of such a militia, and then only if the federal and state governments fail to provide the firearms necessary for such militia service. The First, Third, Eighth, Tenth, and Eleventh Circuits all adopted some form of this model.

> *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942) - This case involved a defendant convicted of transporting and receiving a firearm and ammunition which he subsequently used on a fellow night club patron. This appeal was brought from the district court alleging a denial of due process. The court analyzed *Miller* and found that although it did not impose a general test, it did allow the federal government to limit the possession of firearms by individuals. The court found that the defendant's possession of a firearm had no relation to the regulation of a well-regulated militia and sustained the conviction. Arguably, the First Circuit eventually adopted the Collective Rights Model. *See Thomas v. Members of City Council of Portland*, 730 F.2d 41, 42 (1st Cir. 1984) (citing a Sixth Circuit case to assert that the Second Amendment is a collective right.)
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> *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992) - This case involved an appeal from a conviction for possession of thirteen machine guns. The court cited *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942), and held that the defendant's possession of machine guns was not reasonably related to a well-regulated militia. The court also stated that, "[t]he purpose of the Second Amendment is to restrain the federal government from regulating the possession of arms where such regulation would interfere with the preservation or efficiency of the militia." *Hale*, 978 F.2d at 1020.
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> *United States v. Rybar*, 103 F.3d 273 (3d Cir. 1996) – In an appeal resulting from a conditional guilty plea for possession of machine guns, the court held that there was no absolute right to bear

> firearms and that the defendant's possession had no reasonable relation to a well-regulated militia.
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> *United States v. Haney*, 264 F.3d 1161, (10th Cir. 2001) - In a case involving an appeal from a conviction for possession of machine guns, the court adopted a four part test for the Second Amendment: The defendant "must show that (1) he is part of a state militia; (2) the militia, and his participation therein, is "well regulated" by the state; (3) machine guns are used by that militia; and (4) his possession of the machinegun was reasonably connected to his militia service. None of these are established." *Id.* at 1165.
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> *United States v. Wright*, 117 F.3d 1265 (11th Cir. 1997) *opinion vacated in part on reh'g*, 133 F.3d 1412 (11th Cir. 1998) - In another appeal from a conditional guilty plea for possession of a machine gun, the court held that the Second "amendment was intended to protect only the use or possession of weapons that is reasonably related to a militia actively maintained and trained by the states." *Id.* at 1273.

For other cases from these Courts of Appeals adopting a Sophisticated Rights Model *see United States v. Parker*, 362 F.3d 1279 (10th Cir. 2004) (possession of a pistol on a military base); *United States v. Milheron*, 231 F. Supp. 2d 376 (D. Me. 2002) (possession of a firearm after being committed to a mental institution); *United States v. Lippman*, 369 F.3d 1039 (8th Cir. 2004) (possession of a firearm while subject to a domestic violence order); *United States v. Hutzell*, 217 F.3d 966 (8th Cir. 2000) (conditional guilty plea for possession of a firearm while after a conviction for domestic violence).

Individual Rights Model: Courts that subscribe to this model hold that the Second Amendment confers a right to possess firearms on individuals. The Fifth Circuit is the only Court of Appeals to have adopted this model.

> *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001) - This case involved an appeal from a conviction for possession of a firearm while under a domestic abuse order. The court engaged in a long discussion of the state of the law in other circuits and the text and history of the Second Amendment. The court then held that the Second Amendment conferred an individual right that could be limited in certain instances.

"Until the Fifth Circuit's decision in *United States v. Emerson,* 270 F.3d 203 (2001), every Court of Appeals to consider the question had understood *Miller* to hold that the Second Amendment does not protect the right to possess and use guns for purely private, civilian purposes." *Dist. of Columbia v. Heller,* 554 U.S. 570, 723 n.2 (2008) (Stevens, J., dissenting).

District of Columbia v. Heller: The Watershed and its Aftermath

DC v. Heller – Background:

In 2002 Robert Levy looked for plaintiffs to challenge the D.C. gun law, one of the most restrictive in the nation.

> The District of Columbia generally prohibits the possession of handguns. It is a crime to carry an unregistered firearm, and the registration of handguns is generally prohibited. *See* D.C. Code §§7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (2001). Wholly apart from that prohibition, no person may carry a handgun without a license, but the chief of police may issue licenses for 1-year periods. *See* §§22-4504(a), 22-4506. District of Columbia law also requires residents to keep their lawfully owned firearms, such as registered long guns, "unloaded and disassembled or bound by a trigger lock or similar device" unless they are located in a place of business or are being used for lawful recreational activities. See 7-2507.02.
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> *Dist. of Columbia v. Heller*, 554 U.S. 570, 574 (2008).

One of the plaintiffs was Dick Heller, a security guard who was denied a license to keep a pistol in his home for self-defense. Heller and the other plaintiffs filed suit in the Federal District Court for the District of Columbia, challenging the constitutionality of the District of Columbia's Firearms Control Regulations Act of 1975, asserting that it violated the Second Amendment.

DC v. Heller – Lower Courts:

The District Court dismissed the lawsuit in *Parker v. District of Columbia*. *Parker v. District of Columbia*, 478 F.3d 370 (2007). The Court of Appeals for the District of Columbia reversed, holding that the law violated the Second Amendment. The District of Columbia appealed to the Supreme Court and Certiorari was granted. The Court agreed to hear the case, ruling for the first time since 1939 on the scope of the Second Amendment.

DC v. Heller – Issues:

There were a number of key issues in dispute in *Heller*, including the following central questions:

1. Whether there is an individual right to bear arms for self-defense, aside and apart from any service in the militia.

a. "The two sides in this case have set out very different interpretations of the Second Amendment. Petitioners and today's dissenting Justices believe that it protects only the right to possess and carry a firearm in connection with militia service. . . . Respondent argues that it protects an individual right to possess a firearm unconnected with service in the militia, and to use that arm for traditionally lawful purposes, such as self defense within the home. . . " *Heller* at 578.

2. What limits on the Second Amendment are acceptable and how they should be evaluated?

3. Are the limitations embodied in the DC Statute acceptable under the Second Amendment?

***DC v. Heller* – Decision:**

Justice Scalia wrote for the majority and addressed all three of the above issues.

"The Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home." *Heller* at 592.

This was based upon the following reasoning:

1. The Amendment's prefatory clause announces a purpose, but does not limit or expand the scope of the second part, the operative clause.

    a. Holder of the right : "The people"

        i. "The first salient feature of the operative clause is that it codifies a 'right of the people.' When used elsewhere in the Constitution and Bill of Rights (the First Amendment's Assembly and Petition Clause, the Fourth Amendment's Search and Seizure Clause, and in the Ninth Amendment's Rights Retained By The People), those instances unambiguously refer to individual rights." *Heller* at 579.

        ii. "Reading the Second Amendment as protecting only the right to 'keep and bear arms' in an organized militia therefore fits poorly with the operative clause's description of the holder of the right as 'the people.'" *Heller* at 580-81.

    b. Substance of the Right: "To keep and bear arms"

i. A review of founding era sources indicates "Keep arms" was simply a common way of referring to possessing arms, *for militiamen and everyone else.* *Heller* at 583.

ii. A review of founding era sources demonstrates that "bear arms was not limited to the carrying of arms in a militia." *Heller* at 586.

c. End result:

i. "Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation." *Heller* at 592.

2. The prefatory clause comports with the Court's interpretation of the operative clause. The "militia" comprised all males physically capable of acting in concert for the common defense.

a. Historical sources indicate that the phrase "security of the free state" meant security of a free polity or free country. *Heller* at 577.

b. "It is entirely therefore sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self defense and hunting. But the threat that the new Federal Government would destroy the citizen's militia by taking away their arms was the reason that right- unlike some other English rights- was codified in a written constitution." *Heller* at 599.

3. The Court's interpretation is confirmed by analogous arms-bearing rights in state constitutions that preceded and immediately followed the Second Amendment.

4. The Second Amendment's drafting history reveals three state Second Amendment proposals that unequivocally referred to an individual right to bear arms.

5. Interpretation of the Second Amendment by scholars, courts, and legislators, from immediately after its ratification through the late 19th century also supports the Court's conclusion.

6. None of the Court's precedents forecloses the Court's interpretation.

"The Second Amendment right is not unlimited."

This was based upon the following reasoning:

1. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose:

> "Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller* at 626.
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> "The Court's opinion should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id*.

The handgun ban and the trigger-lock requirement (as applied to self-defense) violate the Second Amendment.

This was based upon the following reasoning:

> The District's total ban on handgun possession in the home amounts to a prohibition on an entire class of "arms" that Americans overwhelmingly choose for the lawful purpose of self-defense. Under any of the standards of scrutiny the Court has applied to enumerated constitutional rights, this prohibition—in the place where the importance of the lawful defense of self, family, and property is most acute—would fail constitutional muster. *Heller* at 571.
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> Similarly, the requirement that any lawful firearm in the home be disassembled or bound by a trigger lock makes it impossible for citizens to use arms for the core lawful purpose of self-defense and is hence unconstitutional. *Heller* at 628-29.
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> As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of

> scrutiny that we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," 478 F.3d, at 400, would fail constitutional muster. *Id.*
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> Because Heller conceded at oral argument that the D.C. licensing law is permissible if it is not enforced arbitrarily and capriciously, the Court assumes that a license will satisfy his prayer for relief and does not address the licensing requirement. Assuming he is not disqualified from exercising Second Amendment rights, the District must permit Heller to register his handgun and must issue him a license to carry it in the home. *Heller* at 572.

***DC v. Heller* – Dissent:**

The Main Dissent was written by Justice Stevens and countered many of the points made by Scalia in the majority with four of their own.

1. The Founders would have made the individual right aspect of the Second Amendment express if that was what was intended. *Heller* at 651 (Stevens, J., dissenting).

2. The "militia" preamble and exact phrase "to keep and bear arms" demands the conclusion that the Second Amendment touches on state militia service only. *Id.*

    a. "This reading is confirmed by the fact that the clause protects only one right, rather than two. It does not describe a right "to keep arms" and a separate right "to bear arms." Rather, the single right that it does describe is both a duty and a right to have arms available and ready for military service, and to use them for military purposes when necessary. Different language surely would have been used to protect nonmilitary use and possession of weapons from regulation if such an intent had played any role in the drafting of the Amendment." *Id.*

3. Many lower courts' later "collective-right" reading constitutes stare decisis, which may only be overturned at great peril. *Heller* at 641 (Stevens, J., dissenting).

    a. "While stare decisis is not an inexorable command, the careful observer will discern that any detours from the straight path of stare decisis in our past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.'" *Id.*

4. The Court has not considered gun-control laws (e.g., the National Firearms Act) unconstitutional. *Heller* at 637-38 (Breyer, J., dissenting).

    a. "In 1934, Congress enacted the National Firearms Act, the first major federal firearms law. Sustaining an indictment under the Act, this Court held that "[i]n the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." *Miller*, 307 U.S., at 178, 59 S. Ct. 816. The view of the Amendment we took in Miller-that it protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons-is both the most natural reading of the Amendment's text and the interpretation most faithful to the history of its adoption." *Id.*

A Second Dissent was written by Justice Breyer, covering slightly different ground from the Stevens Dissent.

1. Looks to early municipal fire-safety laws that forbade the storage of gunpowder (and in Boston the carrying of loaded arms into certain buildings) as demonstrating the Second Amendment has been understood to have no impact on the regulation of civilian firearms.

    a. "Furthermore, several towns and cities (including Philadelphia, New York, and Boston) regulated, for fire-safety reasons, the storage of gunpowder, a necessary component of an operational firearm." *Heller* at 684-85 (Breyer, J., dissenting).

2. Looks to nuisance laws providing fines or loss of firearm for imprudent usage, as demonstrating the Second Amendment has been understood to have no impact on the regulation of civilian firearms. *Heller* at 684.

DC v. Heller* – Aftermath*:

In the 2010 case of *McDonald v Chicago*, 130 S. Ct. 3020 (2010), the Supreme Court held that the Second Amendment applies to the states by way of the 14th Amendment (plurality opinion), or the Privileges and Immunities Clause, (Thomas, J., concurring).

In large part the states and localities with restrictive gun laws have defended their regulations successfully against challenges under *Heller* as "reasonable regulation," and it is in the realm of what is reasonable that the Gun Control battles of the future will be fought.

The Court ruled out rational basis review but otherwise declined to establish a level of scrutiny for examining firearm regulations under the Second Amendment. This omission opened the way for a number of follow up cases, including the case colloquially known as *Heller II* in 2010.

***DC v. Heller II:* Issues**

Heller sued the District of Columbia again after it amended its gun laws ostensibly to bring it into compliance with *Dist. of Columbia v. Heller*. *Heller v. Dist. of Columbia*, 698 F.Supp.2d 179 (2010) (*Heller II).*

The bulk of the opinion dealt with the level of judicial scrutiny to be applied. Judge Urbina identified five post-*Heller* approaches with regard to the appropriate standard of review:

1. "Many courts have managed to rule on the constitutional issues without determining what standard of review applies by, for instance comparing the challenged provisions to the '"presumptively lawful regulatory measures identified in *Heller*.'" *Heller II* at 185.

2. "A minority of courts have applied strict scrutiny based on the fact that the majority opinion in *Heller* describes the Second Amendment right as a 'preexisting right.'" *Id.*

3. "Many other courts have . . . concluded that intermediate scrutiny is the proper standard of review." *Id.*

4. "Still others have applied elements of the undue burden test applicable in the abortion context." *Id.*

5. "Finally, some courts have formulated hybrids of the approaches listed above." *Id.* at 186.

***DC v. Heller II:* Decision**

The Decision, written by Judge Urbina, found against Heller as follows:

1. A reasonableness test was not the appropriate standard for reviewing Constitutionality of Act under Second Amendment. Instead, the appropriate standard was intermediate scrutiny. *Heller II* at 185.

2. The registration requirements in Act withstood intermediate scrutiny and, thus, did not violate Second Amendment. *Id.* at 191-92.

a. "These principles compel the court to conclude that the District's registration requirements withstand intermediate scrutiny. The Council, based on the testimony received during the hearings on the Act, concluded that the registrations scheme is 'critical' to accomplishing the District's public safety goals. In particular, the Council determined based on extensive testimony at the hearings, that it expects the ballistic identification components of the registration requirements to 'enable law enforcement to link bullets and shell casings recovered at crime scenes to the firearm that fired them." *Id.*

b. "The Council acknowledged that the District's registration requirements are more burdensome than those of most cities and states . . . .These rigorous firearms regulations are justified, the Council explained, not only because the District is a densely populated, urban locale, but also because 'as the nation's capital it hosts a large presence of government and diplomatic officials. Therefore, MPD must have every tool to protect all citizens from violence' as well as to 'protect these officials from assassination.'" *Id. at* 192.

3. The bans on assault weapons and large capacity ammunition feeding devices under the Act were constitutional. *Id.* at 193.

a. "The defendants maintain that the prohibitions on assault weapons and large capacity ammunition feeding devices constitute a permissible restriction on the types of firearms available to individuals seeking to exercise their core Second Amendment right because they permit the registration of thousands of other types of firearms." *Id.*

4. The Act's provisions were both "usual" and "reasonable" within the meaning of District of Columbia statute, providing that Council of the District of Columbia is authorized and empowered to make all such usual and reasonable police regulations as the Council may deem necessary for regulation of firearms or weapons. *Heller II* at 195-96.

Final Summary of Present Law:

Heller greatly changed the landscape and frame of reference for Gun Control law, but it will take many more years to discern its true impact on this area of the law. *Heller II* shows the way forward for gun control cases, and suggests that the loosening effect of the 2008 *Heller* case on gun control laws may, in practice, be less than originally thought.

MOCK ORAL ARGUMENT HYPOTHETICAL:
Open Carry by Out-of-State Citizen

Will Pope is the campaign director for Margaret Simpson, a newly-elected Democratic Congresswoman from Utah. Ms. Simpson was elected to Congress in one of the closest races in Utah history. During the campaign, Ms. Simpson and her staff (including Mr. Pope) received numerous threats of violence from individuals who associated themselves with a group called the "Utah Citizens for Freedom." These individuals were never identified or prosecuted, and the Utah Tea Party Movement, with whom the Utah Citizens for Freedom claimed to have been associated, publicly disavowed any association with or knowledge of that group.

Mr. Pope resides in Utah, but makes frequent trips to Washington D.C., to meet with Congresswoman Simpson. Mr. Pope has a fear of flying, so he often drives his SUV from Utah to D.C. and did so on this occasion.

D.C. Code § 7-2502.01(a) provides that "no person or organization in the District shall possess or control any firearm, unless the person or organization holds a valid registration certificate for the firearm." D.C. Code § 7-2502.02(a)(4) provides that individuals who are not retired police officers may only register a handgun "for use in self-defense within that person's home."

On January 15, 2011, Mr. Pope and Congresswoman Simpson attended a fundraising dinner at a private residence in Northwest D.C. Information about the location of the dinner and the attendees was disclosed earlier that day on various Tea Party-affiliated websites, but there were no direct threats to either Mr. Pope or the Congresswoman as a result. Because of fears for both his and the Congresswoman's safety, Mr. Pope brought his pistol with him to the dinner. Mr. Pope's pistol was plainly visible in a holster on his waist.

D.C. Code § 22.4504, provides, in pertinent part, as follows:

> (a) No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in § 22-4515, except that:
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> (1) A person who violates this section by carrying a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon, in a place other than the person's dwelling place, place of business, or on other land possessed by the person, shall be fined not more than $5,000 or imprisoned for not more than 5 years, or both . . . .

After the dinner, as Mr. Pope was crossing the street to his car on the next block, two Washington Metropolitan Police Department officers, who happened to be patrolling the area on foot due to a recent string of burglaries, observed Mr. Pope and his weapon. They confronted Mr. Pope and questioned him about the weapon. Mr. Pope identified himself as Congresswoman Simpson's campaign manager and explained that he was armed because of the prior threats to their safety and the recent Internet postings. Mr. Pope explained that he is from Utah, and that Utah permits open carry of firearms without a special permit or license. Utah also recognizes other states' concealed pistol licenses. After verifying his identity, the officers arrested Mr. Pope and charged him with violation of D.C. Code § 22.4504.

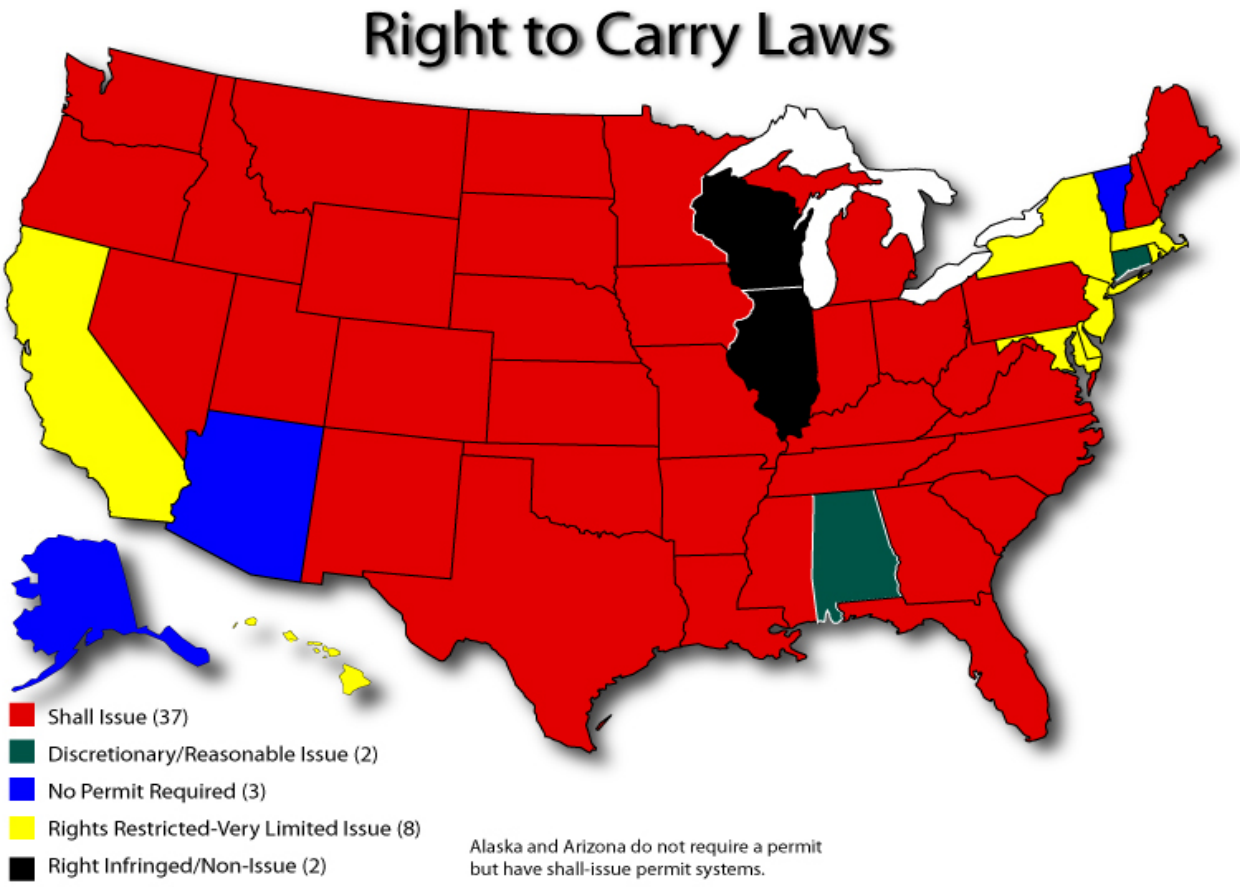
Mr. Pope is now before the D.C. Superior Court on a motion to declare D.C. Code § 22.4504 unconstitutional in light of *D.C. v. Heller* and to dismiss the charges against him.

STATE OF SELF DEFENSE

15 states have "No Retreat" or "Stand Your Ground" Laws**:** Alabama, Arizona, Florida, Georgia, Indiana, Kentucky, Louisiana, Montana, Nevada, Oklahoma, South Carolina (persons not "required to needlessly retreat"), Tennessee, Texas, Utah, and Washington (homicide justifiable in the lawful defense of self or other persons present; and there is imminent danger of such design being accomplished . . . or in the actual resistance of an attempt to commit a felony. . . or upon or in a dwelling, or other place. . .). As of the 28th of May, 2010, Montana, Nebraska, New Hampshire, Pennsylvania are considering "Stand Your Ground" laws of their own. Some of the states that have passed or are considering "stand your ground" legislation are already considered "stand your ground" in their case law. Indiana and Georgia, among other states, already had "stand your ground" case law and passed "stand your ground" statutes due to concerns of the case law being replaced by "duty to retreat" in future court rulings. Other states, including Washington, have "stand your ground" in their case law but have not adopted statutes; West Virginia had a long tradition of "stand your ground" in its case lawhttp://en.wikipedia.org/wiki/Castle_doctrine - cite_note-15 before codifying it as a statute

in 2008. These states did not have civil immunity for self defense in their previous self defense statutes.[1]

[1] http://redensign.files.wordpress.com/2010/05/castle-doctrine-and-stand-your-ground3.jpg



STATE OF RIGHT TO CARRY

There are 40 Right-to-Carry states: 37 have "shall issue" laws, requiring that carry permits be issued to applicants who meet uniform standards established by the state legislature. Two have fairly-administered discretionary-issue carry permit systems. Vermont respects the right to carry without a permit. Alaska and Arizona have "shall issue" permit systems for permit reciprocity with other states, and have allowed concealed carrying without a permit since 2003 and July 2010, respectively. Of the 10 non-RTC states, eight have restrictively-administered discretionary-issue systems; Illinois and Wisconsin have no permit system and prohibit carrying. Iowa became the most recent "shall issue" state on April 29, 2010.[2]

[2] http://www.nraila.org/Issues/factsheets/read.aspx?ID=18

POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

THE DISTRICT'S COMPLETE PROHIBITION ON CARRYING FIREARMS OUTSIDE THE HOME IS UNCONSTITUTIONAL AND INCONSISTENT WITH THE SECOND AMENDMENT

1. **By requiring a permit to carry a handgun in public, yet refusing to issue such permits and refusing to allow the possession of any handgun that would be carried in public, Defendants maintain a complete ban on the carrying of handguns in public by almost all individuals.**

    a. D.C. Code § 7-2502.01(a) provides that "no person or organizations in the District shall possess or control any firearm unless the person or organization holds a valid registration certificate for the firearm."

    b. D.C. Code § 7-2502.02(a)(4) provides that individuals who are not retired police officers may only register a handgun, "for use in self-defense within that persons home."

    c. D.C. Code § 224504(a) provides, "[n]o person shall carry within the District of Columba either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon capable of being so concealed."

    d. Former D.C. Code § 22-4506 empowered the District of Columbia's police chief to issue licenses to carry handguns to individuals. However, on December 16, 2008, the District of Columbia's City Council and Mayor repealed the Police Chief's authority to issue handgun carry licenses.

    e. Accordingly the District of Columbia now lacks any mechanism to issue handgun carry licenses to individuals who are not retired police officers.

2. The Second Amendment's "right of the people to keep and bear arms" refers to two distinct concepts; to possess and to carry.

a. Historically people at the time of the founding understood that the rights of peaceable citizens to carry arms meant just that, to carry arms about their person wherever they traveled to. *United States v. Tooley II*, 717 F. Supp. 2d 580, 591 (S.D.W. Va. 2010), *citing*, Stephen P. Holbrook, "The Founders' Second Amendment", 273 (2008)(stating that the Second Amendment did not need to contain an "explicit exclusion of criminals from the individual right to keep and bear arms [ ] because this … was understood."); *See also*, *Tooley II*, at 590, *quoting*, Pennsylvania Minority Proposal to the Constitutional Convention, ("the people have a right to bear arms for the defense of themselves, their own state, the United States, or for the purpose of killing game. . .").

b. "The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair. And clearly for this purpose, a man would have the right to carry them to and from his home, and no one could claim that the Legislature had the right to punish him for it without violation this clause of the Constitution. But farther than this, it must be held that the right to keep arms involves necessarily, the right to use such arms for all the ordinary purposes and in all the ordinary modes usual in the country and to which arms are adapted. . . " *State v. Andrews*, 50 Tenn. 165, 178 (1871).

c. "'Keep arms' was simply a common way of referring to possessing arms, for militiamen *and everyone else.*" *District of Columbia v. Heller*, 128 S. Ct. 2783, 2792 (2008)(emphasis in original).

d. From our review of founding-era sources, we conclude that this natural meaning was also the meaning that "bear arms" had in the 18th century. In numerous instances, "bear arms" was unambiguously used to refer to the carrying of weapons outside of an organized militia. *Id.* at 2793.

e. At the time of the founding, as now, to "bear" meant to "carry." *Id.*, *citing* Johnson 161; Webster; T. Sheridan, A Complete Dictionary of the English Language (1796); 2 Oxford English Dictionary 20 (2d ed.1989).

f. In *Muscarello v. United States,* 524 U.S. 125, 118 S. Ct. 1911, 141 L.Ed.2d 111 (1998), in the course of analyzing the meaning of "carries a firearm" in a federal criminal statute, Justice Ginsburg wrote that "[s]urely a most familiar meaning is, as the Constitution's Second Amendment . . . indicate[s]: 'wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person. '" *Id*. at 143, 118 S. Ct. 1911 (dissenting opinion) (quoting Black's Law Dictionary 214 (6th ed.1998)).

g. When used with "arms," however, the term has a meaning that refers to carrying for a particular purpose-confrontation. *Heller*, at 2793.

h. Justice Stevens suggests that "keep and bear Arms" was some sort of term of art, presumably akin to "hue and cry" or "cease and desist." (This suggestion usefully evades the problem that there is no evidence whatsoever to support a military reading of "keep arms.") Justice Stevens believes that the unitary meaning of "keep and bear Arms" is established by the Second Amendment's calling it a "right" (singular) rather than "rights" (plural). See *post,* at 2830 - 2831. There is nothing to this. *Id*. at 2797.

i. Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation. *Id*.

3. ***Heller's* recitation of recognized limits on the right to keep and bear arms proves the rule: there is a right *to carry* at least some weapons, in some manner, for some purpose.**

a. "There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course, the right was not unlimited, just as the First Amendment's right of free speech was not. . . Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any* purpose." *Id*. at 2799.

b. "Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the

possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id*. at 2816-17.

c. "*Heller* delineates some of the boundaries of the Second Amendment right to bear arms. At its core, the Second Amendment protects the right of law-abiding citizens to possess non-dangerous weapons for self-defense in the home . . . And certainly, to some degree, it must protect the right of law-abiding citizens to possess firearms for the as-yet-defined, lawful purposes." *United States v. Marzzarella,* 614 F.3d 85, 92 (3rd Cir. 2010).

4. **The District of Columbia may prohibit the carrying of handguns in either a concealed or open manner but it may not ban both.**

a. "In striking down the District of Columbia's handgun ban and trigger lock provisions, the Court relied on the fact that these restrictions applied to the home, where the need for defense of self, family, and property is most acute, . . . But the *Heller* Court also interpreted the phrase bears arms more broadly to mean carry, which it then defined to include wearing upon the person or in the clothing or in a pocket. . .Moreover, the Court later likened the D.C. handgun ban to state laws that preclude the open carrying of weapons in public places." *Castellano on District of Columbia v. Heller*, 2008 Emerging Issues 3174, page 4 of 8.

b. Few laws in the history of our Nation have come close to the severe restrictions of the District's handgun ban. And some of those few have been struck down. In *Nunn v. State,* the Georgia Supreme Court struck down a prohibition on carrying pistols openly (even though it upheld a prohibition on carrying concealed weapons). *See* 1 Ga., at 251. In *Andrews v. State,* the Tennessee Supreme Court likewise held that a statute that forbade openly carrying a pistol "publicly or privately, without regard to time or place, or circumstances," 50 Tenn., at 187, violated the state constitutional provision (which the court equated with the Second Amendment). That was so even though the statute did not restrict the carrying of long guns. *Ibid*. *See also State v. Reid,* 1 Ala. 612, 616-617 (1840) ("A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defen[c]e, would be clearly unconstitutional"). *Heller* at 2818.

c. The *Heller* Court relied on 19th-century cases upholding concealed weapons bans, but in each case, the court upheld the ban because *alternative forms of carrying arms were available* (emphasis added). *See State v. Chandler*, 5 La. Ann. 489, 490 (1850) (holding concealed weapons ban "interfered with no man's right to carry arms . . . in full open view").

d. "The right of the people to keep and bear arms is not infringed by law prohibiting the carrying of *concealed* weapons. . ." *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897).

e. In *Peruta v. County of San Diego*, the court cited *Heller* stating, "The *Heller* Court relied on 19th-century cases upholding concealed weapons bans, but in each case, the court upheld the ban because *alternative forms of carrying arms were available* (emphasis added). *See State v. Chandler*, 5 La. Ann. 489, 490 (1850) (holding concealed weapons ban "interfered with no man's right to carry arms . . . in full open view"). . ." *Peruta v. County of San Diego*, 2010 WL 5137137 (S.D. Cal. Dec. 10, 2010).

5. **The *Heller* Court indicated that the right to bear arms can be restricted in sensitive places, limited to those arms within the scope of the Second Amendment protection (i.e., handguns), barred to dangerous individuals and restricted to lawful purposes. The District of Columbia in its entirety *cannot* be a sensitive place and so it may not completely ban the carrying of handguns for self-defense.**

a. *See DiGiacinto v. George Mason University*, ___ Va.___ (2011) ("The regulation does not impose a total ban of weapons on campus. Rather the regulation is tailored, restricting weapons only in those places where people congregate and are most vulnerable – inside campus buildings and at campus events. Individuals may still carry or possess weapons on the open grounds of GMU, and in other places on campus not enumerated in the regulation. We hold that GMU is a sensitive place and that 8 VAC § 35-60-20 is constitutional . . . ").

b. *See also United States v. Masciandaro*, 648 F. Supp. 2d 779, 789-90 (E.D. Va. 20009) ("These principles, applied here, compel the conclusion that under any elevated level of constitutional scrutiny, Masciandaro's as applied challenge must fail. First, the governmental interest furthered by § 2.4(b) – public safety in National Parks – is both important and compelling. In addition, § 2.4(b) is

both narrowly tailored and substantially related to furthering public safety in National Parks. In this respect § 2.4(b) does not have the prohibit carrying or possessing a loaded firearm on National Park land *outside* motor vehicles, nor does § 2.4(b) prohibit carrying *unloaded* firearms in motor vehicles on National Park land.")

6. **There is an inherent right to self-defense that is well established and the Supreme Court has protected this right for at least the last 115 years recognizing that the right to self defense exists wherever the person, "has the right to be."**

   a. "Stand your ground" governs U.S. federal case law in which self-defense is asserted against a charge of criminal homicide. The Supreme Court ruled in *Beard v. United States*, 158 U.S. 550, 15 S. Ct. 962 (1895) that a man who was "where he had the right to be" when he came under attack and" . . . did not provoke the assault, and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life, or do him great bodily harm. . . was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground."

   b. There is a Second Amendment right to use a handgun for the core lawful purpose of self-defense. *Heller*, at 2818.

   c. In *Heller*, the Court observed that, "the American people have considered the handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." *Id.*

   d. In *People v. Toler*, 9 P.3d 341, 347-48 (Colo. 2000), the court stated that in contrast to the "retreat to the wall" doctrine, many jurisdictions developed a "no duty to retreat" rule, or "true man" doctrine for the use of physical force in self-defense. *See, e.g., Beard v. United States*, 158 U.S. 550, 560-561, 15 S. Ct. 962, 39 L. Ed. 1086 (1895); *State v. Renner*, 912 S.W.2d 701, 703-04 (Tenn.1995). The "true man" doctrine stands for the proposition that a "true person," or someone who is without fault, does not have to retreat from an actual or

threatened attack even if he could safely do so before the person may use physical force in self-defense. *See* 40 Am.Jur.2d *Homicide* § 164 (1999). Furthermore, the "true person" does not have to consider whether a reasonable person in the situation would opt to retreat to safety rather than resorting to physical force to defend against unlawful force. *See id.; Renner*, 912 S.W.2d at 704. Typically, jurisdictions state that the "true person" doctrine applies when (1) the defendant is "without fault in provoking the confrontation;" (2) the defendant is "in a place where he has a lawful right to be;" and (3) the defendant has a reasonable fear that the victim is about to cause the defendant immediate serious bodily harm or death. *See, e.g., Beard*, 158 U.S. at 561-62, 15 S. Ct. 962; *Renner*, 912 S.W.2d at 704.

POINTS AND AUTHORITIES
IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

THE DISTRICT OF COLUMBIA PROPERLY PROHIBITS CARRYING WEAPONS IN PUBLIC

1. *Heller* Does Not Stand For The Proposition That The Right To Bear Arms Encompasses The Carry Of Firearms In Public.

a. "Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Dist. of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

b. "Just over a year ago, the Supreme Court in *Heller* interpreted" the Second Amendment to "guarantee [an] individual right to possess and carry weapons in case of confrontation." 128 S. Ct. at 2797. Of course, *Heller* 's holding was much narrower. More specifically, the Supreme Court in *Heller* addressed three District of Columbia weapons laws, which taken together "totally ban[ned] handgun possession in the home" and "require[d] that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable." *Id.* at 2817. Importantly, *Heller involved an as-applied challenge to these provisions by a D.C. special police officer* who sought an injunction ordering the District of Columbia to issue him a license to carry his handgun, operable and free of a trigger lock, in his home. In finding that the officer was entitled to the relief sought, the Supreme Court summarized its holding as follows:

> In sum, we hold that the District's ban on handgun possession *in the home* violates the Second Amendment, as does its prohibition against rendering any lawful firearm *in the home* operable for the purpose of immediate self-defense. Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it *in the home.*

Id. at 2821-22 (emphasis added). Thus, *Heller*'s narrow holding is explicitly limited to vindicating the Second Amendment "right of law-abiding, responsible citizens to use arms in defense *of hearth and home.*" *Id.* at 2821 (emphasis added). *United States v. Masciandaro*, 648 F. Supp. 2d 779, 786-87 (E.D. Va. 2009).

c. "Important questions about the reach of *Heller* remain to be answered, but what assuredly is not "clear" and "obvious" from the decision is that it dictates an understanding of the Second Amendment which would compel the District to license a resident to carry and possess a handgun outside the confines of his home, however broadly defined." *Sims v. United States*, 963 A.2d 147, 150 (D.C. 2008) (upholding conviction where defendant was found to have carried and possessed a loaded pistol which he discarded while outside the curtilage of his home).

2. The DC Firearm Restrictions Are Constitutional Facially And As Applied.

FACIAL CHALLENGES:

a. "[a] facial challenge to a legislative Act is . . . the most difficult to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

b. DC courts have previously rejected claims that the CPWL (carrying pistol without license) statute is unconstitutional on its face. *See Riddick v. United States*, 995 A.2d 212, 221 (D.C. 2010) and cases cited therein.

c. "We are not persuaded that 'no application of the [CPWL] statute could be constitutional' or that the restriction the CPWL statute imposes comes even close to presenting the kind of 'weighty' reason that the Supreme Court has concluded justifies declaring a statute invalid on its face." *Brown v. United States*, 979 A.2d 630, 639 (D.C. 2009) cert. denied, 131 S. Ct. 819 (U.S. 2010) (rejecting defendant's facial challenge to CPWL holding that the licensure requirement imposed by the CPWL statute is not a substantial obstacle to the exercise of Second Amendment rights).

AS-APPLIED CHALLENGES:

a. In analogous situations courts have upheld convictions for public possession of a firearm.

b. In *Williams v. State*, 16 SEPT.TERM 2010, 2011 WL 13746 (Md. Jan. 5, 2011) the Court of Appeals of Maryland upheld a conviction under a Maryland statute that prohibits wearing, carrying, or transporting a handgun, without a permit outside of one's home. The court held that

since the Maryland statute related to the carry of firearms outside of the home it is "outside the scope of the Second Amendment."

> "Williams, however, attempts to bring his conviction of wearing, carrying, or transporting a handgun in public, without a permit, within the ambit of *Heller* and *McDonald* by claiming that those opinions would prohibit his conviction. This is not the case, because *Heller* and *McDonald* emphasize that the Second Amendment is applicable to statutory prohibitions against home possession, the dicta in *McDonald* that "the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home," notwithstanding. ___ U.S. at ___, 130 S. Ct. at 3044, 177 L.Ed.2d at 922. *Although Williams attempts to find succor in this dicta, it is clear that prohibition of firearms in the home was the gravamen of the certiorari questions in both Heller and McDonald and their answers. If the Supreme Court, in this dicta, meant its holding to extend beyond home possession, it will need to say so more plainly*." (emphasis added).

c. In *United States v. Masciandaro, 648 F. Supp. 2d 779* (E.D. Va. 2009) the United States District Court for the Eastern District of Virginia upheld a conviction for possession of a loaded weapon in a motor vehicle in a National Park. The court held that the firearms restriction was valid under "any elevated level of constitutional scrutiny" because it does not place a "substantial obstacle" in the defendant's exercise of his Second Amendment right to use arms *in defense of hearth and home. Id.* 790.

d. In *Sims v. United States*, 963 A.2d 147 (D.C.2008), where the appellant was found to have carried a loaded pistol while outside the curtilage of his home, the court rejected appellant's claim that the Second Amendment barred his prosecution for weapons offenses, including CPWL, and affirmed his convictions. *Compare Plummer v. United States*, 983 A.2d 323 (D.C. 2010) (remanding the case to the trial court with instructions to hold a hearing because resolution of his claim that the Second Amendment prohibited his conviction for CPWL within the curtilage of his home required findings about whether "in the absence of the District's almost absolute prohibition on possession of handguns" the defendant could have obtained the required certificate prior to the imposition of changes in this case.)

e. In *People v. Ferguson*, 873 N.Y.S.2d 513 (N.Y. Crim. Ct. 2008) the court rejected the defendant's contention that PL § 265.01[1] (Criminal Possession of a Weapon in the Fourth Degree) as applied to the defendant was unconstitutional under *Heller*. The defendant, a California resident, was arrested at the airport while attempting to return home after a vacation in New York. Before leaving California he had contacted the airline about the proper procedure for carrying a firearm on an airplane and was told the firearm had to be checked as baggage and had to be carried unloaded in a sealed case. Upon his attempt to check the gun he was arrested for possession of the weapon. The defendant contended that as a resident of California, possessing a license to carry the firearm in that state, transporting it unloaded as instructed by the airline and having taking a course on the use of firearms, his constitutional right to carry for self protection had been violated. The court refused to dismiss the charge, citing the seriousness of having a firearm in an airport in a state in which he was not licensed to carry, and stating "licensing is an acceptable regulatory measure and an airport falls within the scope of a 'sensitive place.'"

3. The DC Statute Is A Reasonable Restriction On The Use Or Ownership Of Firearms And Is Substantially Related To The Achievement Of Important Government Interests.

a. District law currently allows a person holding a valid registration for a firearm to carry the firearm "[w]ithin the registrant's home; [w]hile it is being used for lawful recreational purposes; [w]hile it is kept at the registrant's place of business; or [w]hile it is being transported for a lawful purpose as expressly authorized by District or federal statute . . . ." D.C. Official Code § 22-4504.01. Exemptions also allow current and retired law-enforcement officers to carry weapons. D.C. Official Code § 22-4505.2. As such, it is not, as stated by Defendant, a complete ban on the carrying of firearms in public.

b. Because it is a sensitive Place, the District's gun regulations are permissible under *Heller*.

i. The District shares the problem of gun violence with other dense, urban jurisdictions—a problem which is quite different than the experience in the rest of suburban and rural America. The District, however, has a unique distinction: as the nation's capital it hosts a large presence of government and diplomatic officials. Sadly, the District is no stranger to attacks on such officials—the assassinations for Presidents Lincoln and Garfield, attempted assassination of President Reagan, the assassination of former Chilean official Letelier, etc. Government officials and

diplomats are constantly moving about the District. The threat of gun violence against them is an especial concern, and one of which we are reminded almost daily in the international news. *Council of the District of Columbia, Committee on Public Safety and the Judiciary*, Report on Bill 17-593, the "Inoperable Pistol Amendment Act of 2008," November 25, 2008, at 3 ("IPAA Rep.").

ii. *See also Hearing on the Impact of Proposed Legislation on the District of Columbia's Gun Laws Before the House Comm. on Oversight & Government Reform* (Sept. 9, 2008) (Testimony of Cathy L. Lanier, Chief of Police) at 2–4.

> "[I]t would be far more difficult for MPD and Federal law enforcement agencies in the District of Columbia to ensure safety and security in the Nation's Capital.
>
> [P]rotecting government officials and infrastructure is a challenge for every city in the United States. But in Washington, DC, the likelihood of attack is higher, and the challenges to protecting the city are greater.
>
> [T]he high-profile human targets—from the Nation's top elected leaders to the more than 400 foreign dignitaries that make official visits to DC each year—are also an obvious and attractive target.
>
> [I]n addition to assisting the Secret Service with daily movements of the President and Vice President around the city, and protecting foreign dignitaries, MPD also provides security support for more than 4,000 special events annually.
>
> [I]magine how difficult it will be for law enforcement to safeguard the public, not to mention the new President at the Inaugural Parade, if carrying semi-automatic rifles were to suddenly become legal in Washington.
>
> [A]llowing [weapons] to be carried in a large number of places outside the home will make this job much more dangerous and difficult. It is clear to me and others engaged every day in securing DC against terrorism that our city is unique."

c. Outside of the home and work, a gun owners desire to carry a weapon is usually subordinate to the need to protect public safety.

i. "In exempting property owners or persons in their fixed place of business, the legislature was mindful of the need of people to defend their homes and businesses from unlawful intruders and the fact that the police cannot protect every home and every business 24 hours a day. [T]he legislature sought to prevent . . . the mass possession of weapons, which would have posed a danger to the public and the police alike. In limiting the allowable possession of weapons to property in which one has ownership, the legislature has balanced a person's need to protect his home or business with the need of the general public and the police to be protected from potential use of weapons in situations unrelated to protecting one's property or business." *People v. Pulley*, 803 N.E.2d 953, 961 (Ill. App. Ct. 2004), *appeal denied*, 809 N.E.2d 1291 (Ill. 2004).

ii. *See also United States v. Masciandaro*, 648 F. Supp. 2d 779, 790 (E.D. Va. 2009) ("Thus, unlike a home or other private property, where the "need for defense of self, family, and property is most acute," the locations in National Parks where vehicles travel, like schools and government buildings, are sensitive places where the Second Amendment leaves the judgment of whether (and if so, how) to regulate firearms to the legislature, not the judiciary.").

4. Defendant Has Seized Upon Dicta In *Heller* To Bolster His Argument Because The Weight Of Authority Is Against Him.

a. The holding in *Heller* is limited to its specific facts—the Second Amendment protects the right of law-abiding, responsible citizens, to keep and bear weapons *in the home* for the purpose of immediate self-defense.

b. In *Heller v. District of Columbia,* 689 F. Supp 2d 179 (2010)(Heller II) , the U.S. District Court for the District of Columbia held that the District's firearms registration scheme, its prohibition on assault weapons and its prohibition on large capacity ammunition feeding devices all withstood intermediate scrutiny. *See also, Williams v. State*, 16 SEPT.TERM 2010, 2011 WL 13746 (Md. Jan. 5, 2011); *DiGiacinto v. George Mason University*,___Va. ____ (2011); *United States v. Luedtke*, 589 F. Supp. 2d 1019 (E.D. Wis. 2008) ("Not surprisingly, defendants have seized

upon *Heller* to mount various challenges to federal prosecutions for firearm possession, thus far without success.") and cases cited therein.

5. Conclusion.

a. The DC statute does not implicate the core Second Amendment right to use arms for the purpose of self-defense in the home.

b. The DC statute is substantially related to the achievement of the important government interest of promoting public safety.

c. The fact that the DC statute is more restrictive than other jurisdictions' is of no moment because the District is an urban locale that faces a unique set of threats.

d. There is no constitutional or "inherent right of self-defense" that permits the unconditional carry of firearms in public.